

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 867 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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ARVINDKUMAR NATVARLAL SONI

Versus

STATE OF GUJARAT

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Appearance:

MR. C.B. DASTOOR, Advocate for Petitioner

MR. S.R. DIVETIA, A.P.P. for the Respondent.

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CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 12/07/96

ORAL JUDGEMENT: (Per: Panchal,J.) :-

By means of filing this appeal under section 374(2) of the Code of Criminal Procedure,1973, the appellant has challenged legality and validity of

judgment and order dated September 30, 1988 rendered by the learned Additional Sessions Judge, Nadiad, in Sessions Case no. 78/88, convicting the appellant under sections 17 and 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act" for short) and sentencing him to suffer R.I. for ten years as well as fine of Rs. 1 lac i/d. R.I. for one year under section 17 of the Act and R.I. for five years as well as fine of Rs. 50,000 i/d. R.I. for six months under section 20(b)(i) of the Act. It may be mentioned that substantive sentences are ordered to run concurrently.

2. Briefly stated the prosecution case is that Mr. Manharprasad Nagardas Patel, who was then discharging duties as Police Sub Inspector, Dakor Police Station, Dakor received an information that Rabiyabibi, who was originally accused no. 2, was dealing in opium, ganja and charas at her residence situated in the compound of Navalsha Pir Dargah at Dakor. On receipt of the information, Mr. Patel requisitioned services of two panchas and raided the house of Rabiyabibi on September 27, 1987. The person of Rabiyabibi was searched, which resulted into recovery of 1500 grams opium. The house of Rabiyabibi was also searched, which resulted into find of 750 grams ganja and 15 grams charas. Thereupon, Rabiyabibi was arrested and remanded to police custody. During the course of investigation, Rabiyabibi disclosed on October 5, 1987 that she had sold opium to Arvindbhai Soni, who is appellant in this appeal. On the information provided by Rabiyabibi, house belonging to the appellant was searched, but nothing incriminating was found. Thereafter, the appellant was arrested on October 5, 1987. It is the prosecution case that while in custody, the appellant showed his willingness to give information regarding opium and ganja concealed by him. Therefore, the investigating officer summoned two panchas and in their presence, prepared 1st part of the panchnama. The prosecution asserts that the appellant led panchas as well as police officials near culvert situated on Kapadwanj road and took out opium and ganja from a recess in one of the walls of culvert. The opium and ganja were seized, packed and sealed in presence of panchas. The packet containing muddamal articles were sent for analysis. The report by Senior Scientific Assistant, Forensic Science Laboratory-cum-Assistant Chemical Examiner to Government of Gujarat, Ahmedabad indicated that the sample contained opium as well as ganja. At the conclusion of investigation, the appellant was chargesheeted under sections 17, 18, 20 & 29 of the Act. As the offences were triable by the Court of Sessions, the case was committed to Sessions Court for

trial.

3. The learned Judge framed charge at Exh.12 against the appellant under sections 17, 18, 20 & 29 of the Act. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, in order to prove its case against the appellant, examined following witnesses :-

- (1) Jayantilal Someshwar Bhatt, PW.3, exh.29
- (2) Bhupatbhai Mohanbhai, PW.5, exh.38
- (3) Mohanbhai Jugabhai, PW.7, exh.40
- (4) Manharprasad Nagardas Patel, PW.9, exh.46.

The prosecution also relied on panchnama of the house of the appellant exh.31 and discovery panchnama made under section 27 of the Indian Evidence Act at exh.32 to prove its case against the appellant.

4. After recording of the evidence of prosecution witnesses was over, learned Judge recorded statement of the appellant under section 313 of the Code of Criminal Procedure, 1973. The appellant in his statement under section 313 claimed that the case against him was false. Though the appellant did not adduce any evidence in defence, he submitted an affidavit at exh.56 indicating that he is a social worker and is falsely implicated by P.S.I. Mr. Patel, as he had made complaint against him before his higher officer.

5. The learned Judge after taking into consideration the evidence led by the prosecution, recorded following conclusions :-

- (1) The prosecution has failed to prove that the appellant was selling opium to accused no.4, as Bhupatbhai Mohanbhai PW.5, exh.38 has not supported the prosecution.
- (2) Similarly, the evidence of Mohanbhai Jugabhai, PW.7, exh.40 does not indicate in any manner that the appellant was selling opium to original accused no.4.
- (3) The evidence of panch witness Jayantilal Someshwar, PW.3, exh.29 indicates that opium and ganja were discovered on October 5, 1987 in consequence of information received from the appellant from a recess in one of the walls of culvert situated on Kapadwanj road.
- (4) The evidence of panch witness Jayantilal Someshwar is amply corroborated by the contents of panchnama exh.32.
- (5) The evidence of panch witness Jayantilal

Someshwar PW.3, exh.29 is also corroborated by the evidence of Investigating Officer Manharprasad Nagardas Patel, PW.9, exh.46.

- (6) The evidence of Public Analyst read with his report proves that the substances discovered at the instance of the appellant were charas and ganja.
- (7) The prosecution has proved beyond reasonable doubt that the appellant possessed opium and ganja in contravention of provisions of the Act.

6. In view of the above-referred to conclusions, learned Judge convicted the appellant under sections 17 as well as 20(b)(i) of the Act and imposed sentences which have been referred to hereinabove, giving rise to the present appellant.

7. Mr. C.B.Dastur, learned Counsel for the appellant has taken us through the entire evidence on record. It was submitted on behalf of the appellant that evidence of panch witness Jayantilal Someshwar is full of infirmities and, therefore, should not have been relied on by the learned Judge for believing discovery under section 27 of the Indian Evidence Act. It was emphasised by the learned Counsel for the appellant that because of the complaint made by the appellant against the investigating officer, the appellant was falsely implicated and, therefore, the appeal deserves to be allowed. The learned Counsel for the appellant pleaded that when the prosecution failed to adduce substantive evidence worth the name against the appellant, recovery of opium and ganja on the strength of so called information given by the appellant would hardly advance the prosecution case and, therefore, the appeal should be accepted. It was asserted that it is risky to convict an accused on weak and slander evidence like recovery of narcotic substance on the information given by the accused and, therefore, the appeal should be allowed.

8. Mr. S.R.Divetia, learned Counsel for the respondent contended that as held by the Trial Court, evidence of panch witness Jayantilal Someshwar is not only corroborated by the contents of panchnama exh.35, but also corroborated by the evidence of Investigating Officer Mr. Patel and, therefore, the appeal should not be accepted. It was pleaded on behalf of the respondent State that the fact that opium and ganja were recovered at the instance of the appellant from the place mentioned in the panchnama indicates that the appellant had kept opium there and the fact that the place did not belong to the appellant and that place was accessible to others,

would not show that opium was not in his possession, but was kept by someone-else. The learned Counsel for the State Government emphasised that cogent and convincing reasons have been given by the learned Judge while convicting the appellant and, therefore, the Court should not interfere with the findings of fact recorded by the Trial Court.

9. The question which arises for consideration of the Court is whether opium weighing 150 grams and ganja weighing 2 grams were recovered on October 5, 1987 in consequence of information received from the appellant ? Before deciding this question it would be relevant to notice that the prosecution relied on the evidence of Bhupatbhai Mohanbhai, PW.5, exh.38 and Mohanbhai Jugabhai, PW.7, exh.40 to prove that the appellant was selling opium to original accused no.4 in contravention of the provisions of the N.D.P.S.Act. However, witness Bhupatbhai Mohanbhai, PW.5, exh.38 has not supported the prosecution at all. As he did not support prosecution, learned Public Prosecutor had sought permission of the Court to treat him as hostile witness. The permission as prayed for was granted by the learned Judge and after declaring him hostile, he was cross-examined on behalf of the prosecution. It is well settled that evidence of a hostile witness can be relied on if it is corroborated by other reliable evidence on record. The prosecution also relied on the evidence of Mohanbhai Jugabhai, PW.7, exh.40. However, this witness has not stated in his evidence that he had seen the appellant selling opium to original accused no.4 in contravention of provisions of the N.D.P.S.Act. This witness is not declared hostile at all. Under the circumstances, the evidence of hostile witness does not get corroboration from the evidence of any other reliable evidence on record. Therefore, the learned Judge has rightly observed that prosecution failed to establish that the appellant was selling opium to accused no.4.

10. As the prosecution has failed to adduce substantive evidence worth the name against the appellant, question arises as to what weight should be attached to the recovery of opium and ganja on the information given by the appellant.

11. Panch witness Jayantilal Someshwar, PW.3, exh.29 in his examination-in-chief has stated that at about 4.00 p.m. on September 29, 1987 he was called at Dakor Police Station and at that time P.S.I. Mr. Patel, Rabiyabibi-original accused no.2 and another panch witness Hasmukhbhai were present. He has deposed before

the Court that in his presence Rabiyabibi had stated that she had received opium and ganja through Papankhan Gulabkhan Pathan of Naugava village from Sherullakhan Ajimullakhan of village Ratanpura. His evidence also indicates that Rabiyabibi had shown willingness to show residence of Sherullakhan and, therefore, he in the company of police officials had gone to the residence of Sherullakhan, but during search of house of Sherullakhan nothing incriminating was found. This witness has further stated that on 5.10.1987 at about 8.00 a.m. again he was called at Dakor Police Station and Rabiyabibi had shown willingness to show the house of the appellant. This witness has stated that he had accompanied Rabiyabibi and other police officials to the house of the appellant and though the house of the appellant was searched, nothing incriminating was found. It is relevant to note that in his examination-in-chief this witness has stated that at the time when the house of the appellant was searched, he was found to be present in his house. This witness has further stated before the Court that on the same day again he was summoned at the Police Station at about 11.00 a.m. and in his presence the appellant had shown willingness to give information regarding opium concealed by him. The evidence of this witness shows that first part of the panchnama was prepared at the Police Station and thereafter raiding party was led by the appellant near a culvert situated on Kapadwanj road. The witness has asserted that the appellant had taken out opium and ganja from recess in one of the walls of culvert, which was seized, packed and sealed in his presence. In his cross-examination, the witness has stated that at the time when the house of the appellant was searched, appellant was not present. The witness has denied the suggestion that on October 5, 1987 he was ill and had gone to Anand for the purpose of taking medicine from Dr. C.D.Patel. He has further admitted in his cross-examination that it is not true that the appellant had taken out opium and ganja from near the culvert. P.S.I. Mr. Patel PW.9, exh.46 has corroborated panch witness Jayantilal Someshwar. However, the investigating officer maintained that at the time when house of the appellant was searched, the appellant was present in the house. Therefore, on material point viz. whether the appellant was present or not at the time when his house was searched, there is contradiction in the evidence of panch witness and the investigating officer. In the panchnama exh.31 it is mentioned that the appellant was present when his house was searched. Thus, panch witness is neither corroborated by the evidence of P.S.I. Mr.Patel nor by the contents of panchnama exh.31 when he stated before

Court that the appellant was not present at the time when his house was searched. This contradiction in the evidence of panch witness and the investigating officer makes presence of the appellant doubtful at the time when his house was searched, from which nothing incriminating was found. It is surprising to note that after lapse of some time, the investigating officer had again requisitioned services of this very panch witness while effecting discovery pursuant to the so-called information given by the appellant. Before effecting the discovery pursuant to the information given by the appellant, witness Jayantilal Someshwar had already acted as panch witness on two occasions and, therefore, P.S.I. Mr.Patel should have tried to secure presence of another independent witness while effecting discovery pursuant to the information given by the appellant. Be that as it may, exh.56 which is the affidavit tendered by the appellant in the Trial Court, indicates that the appellant had made complaint against P.S.I. Mr.Patel before his higher officer. On overall view of the matter, we are of the opinion that P.S.I. Mr.Patel had failed to requisition services of independent panch witnesses before effecting discovery of opium and ganja pursuant to the information received from the appellant. We, therefore, do not think it prudent to rely upon discovery evidence which by itself is a very weak piece of evidence, more particularly when the prosecution failed to adduce reliable substantive evidence against the appellant.

12. Moreover, it is clearly admitted by the panch witness and the investigating officer that the place from which opium and ganja were recovered is a part of public way. The evidence led by the prosecution shows beyond doubt that it is accessible to one and all and not only the culvert is being used by vehicles, but also by passers by. There is no manner of doubt that opium and ganja were recovered from a public place. When the culvert from which opium and ganja were recovered, is situated in public place and is accessible to all and sundry, it would be difficult to hold positively that the appellant was in possession of opium and ganja. The fact of recovery at the instance of appellant is compatible with the circumstances of somebody-else having placed opium and ganja there and of the appellant some-how acquiring knowledge about its whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the appellant was in possession of narcotic substance. In case of *Trimbak vs. State of Madhy Pradesh*, A.I.R. 1954 S.C.39 the appellant was prosecuted for the offences punishable under sections 395, 410 & 411 of the Indian Penal Code. The prosecution

relied on the recovery of ornaments from an open field in consequence of information given by the appellant. The learned Magistrate acquitted the appellant and the co-accused and held that recovery of stolen property from a field which was accessible to all and which did not even belong to appellant, was not sufficient to bring guilt home to the appellant or to prove that he was in possession of stolen goods. The State Government preferred an appeal to the High Court. The High Court agreed with the finding of the trial Magistrate that the appellant was not guilty of offence under section 395. It, however, convicted him under section 411 of I.P.C. for receiving stolen property. While setting aside the conviction, the Supreme Court has held that when the field from which the ornaments were recovered, was an open one and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The Supreme Court has emphasised that the fact of recovery by the accused is compatible with the circumstances of somebody-else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as a conclusive proof that the accused was in possession of those articles.

13. Again, in the case of DUDH NATH PANDAY vs. State of Uttar Pradesh, A.I.R. 1981 S.C. 911 the appellant was convicted under section 302 by the Sessions Court. The order of conviction was confirmed by High Court. The prosecution had also relied on evidence of recovery of pistol at the instance of the appellant. While discarding evidence regarding recovery, the Supreme Court has held that where the statement accompanying the discovery is woefully vague to identify the authorship of concealment, the pointing out of the weapon may at best prove the accused's knowledge as to where the weapon was kept, but evidence of recovery of article cannot by itself prove that he was in possession of that article.

14. Applying the principle laid down by the Supreme Court in the above referred to two cases, we are of the opinion that the recovery having been effected from a public place, at the best can indicate knowledge of the appellant about the concealment of opium, but would not indicate in any manner that he was in possession of opium as well as ganja and that he had concealed the same. On the facts and in the circumstances of the case, we are of the view that the learned Judge committed an error in placing reliance on the discovery panchnama for the purpose of coming to the conclusion that the appellant

was in possession of opium and ganja in contravention of the provisions of the Act. Under the circumstances, the conviction recorded and sentence imposed on the appellant are liable to be set aside.

For the foregoing reasons, the appeal succeeds. The judgment and order dated September 30, 1988 rendered by the learned Additional Sessions Judge, Nadiad in Sessions Case no. 78/88 convicting the appellant under sections 17 and 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentences imposed thereunder, are hereby set aside and quashed. The appellant is acquitted of the offences with which he was charged. As the appellant is on bail, the bail bonds executed by him stand cancelled. Order regarding muddamal articles passed by the learned Judge is hereby confirmed.